The principal case presents a difficult question in the application of this test. On the one hand, there is the element of protection of the public in the use of its easement, in that the travel on the sidewalks and canal is made safer. On the other hand, the very nature of a canal necessitates the building of a bridge aside from reasons of public safety.[10] The expense of an ordinary bridge should be chargeable to the creation of this new public right. The railroad theoretically should bear only the added expense necessary in making the bridge of such form as will insure against danger to the public passing underneath. Because of the difficulty in differentiating the two elements involved, the result of the principal case may perhaps afford rough justice, but it is submitted a more just and scientific result could have been reached by some attempt at differentiation by expert estimate. In so doing, what seems an inroad on the constitutional guaranty against the taking of private property without compensation could have been avoided.

RIGHT OF RECOVERY FOR TESTAMENTARY LIBEL. — A testator, leaving a small bequest to his niece, described her in the will as the illegitimate child of his brother. A recovery was allowed against the estate of the deceased in an action of libel. *Harris* v. *Nashville Trust Co.*, 162 S. E. 584 (Tenn.). The court argues that, although the principle *actio personalis moritur cum persona* causes a tort action accruing during the life of the wrongdoer to abate, the peculiar fact in the principal case that the wrong resulting from the tortious act occurred only after the death of the tortfeasor renders the maxim inapplicable.[1] The question of the survival or creation of rights after death, as a result of obligations incurred or acts done during the life of the deceased, is rendered difficult by its historical development.

Historically the earliest common law seems to have considered that death terminated all rights and obligations. Since personal rights and their correlative duties could only exist *inter partes*, after death this double relation was impossible; and substitution, as well as assignment *inter vivos*, was thought inconsistent with the personal nature of the obligations.[2] The non-transferability of choses in action to-day is traceable to the same idea.[3] With the establishment of a right to inherit or to acquire property by testamentary disposition, the notion developed that an obligee might have rights, arising at death, in the prop-

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sation is always ultimately contemplated, regulation amounting to confiscation being unconstitutional.

[10] See dissenting opinion in principal case when in Minnesota Supreme Court. Chicago, M. & St. P. Ry. Co. *v.* City of Minneapolis, 115 Minn. 460, 473, 133 N. W. 169, 174.

[1] Although the possibility of a tort being committed in the publication to the attesting witnesses during the testator's life is conceded by the court, the discussion is confined to the re-publication in the probate of the will.

[2] See 3 STREET, FOUNDATION OF LEGAL LIABILITY, ch. vi; 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 258. For discussion of the early idea that all property interest ceased at death, see BIGELOW, THEORY OF POST-MORTEM DISPOSITION, 11 HARV. L. REV. 69; GROSS, MEDIEVAL LAW OF INTESTACY, 18 HARV. L. REV. 120.

[3] See 3 STREET, FOUNDATION OF LEGAL LIABILITY, 62.

erty of the deceased, distinct from those merely personal rights which, as shown by the foregoing discussion, abated with the death of the obligor.[4] Of the obligations existing before death the first to survive were promises to pay money where the heirs were specifically named as obligors.[5] Before the end of the thirteenth century, rights of action against an executor were given to any creditor who had a sealed writing for his debt.[6] A debt, it will be remembered, was formerly thought of as property, the lender supposing himself to own a sum of money in the possession of the borrower without owning any particular coins.[7] The development of the action of assumpsit led to the extension of revival to contract actions in general, apparently on the ground that the principle deducible from the early cases was that, unless the obligor had a right to wage his law, no contractual obligations abated at death.[8] The original idea of a tort right of action, on the other hand, was connected with revenge.[9] But in case the suit was in substance for restitution, the rights involved were thought of as connected with the property rather than with the person of the deceased. By judicial legislation in the end of the sixteenth century, tort actions were held to survive where the estate had been enriched by accretion from the wrongful taking.[10] This right was confined by later cases to waiving the tort and suing in quasi-contract.[11] At common law replevin did not survive against the executors.[12]

Apart from early statutes, therefore, the common-law exceptions seem confined to cases where a party expressly covenants to bind his heirs, or where he incurs an obligation in his life time, the nature of which was originally associated with the property, rather than merely with the person, of the deceased.[13]

Analytically the common-law distinction as to survival in favor of rights of action founded on contract is illogical.[14] As far as the personal

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[4] See 3 STREET, FOUNDATION OF LEGAL LIABILITY, 62 ff.

[5] The original idea seems to have been that one may put an obligation upon the heirs and assigns into whose hands his property will eventually devolve. That the heirs' legal liability was early limited to the value of the property inherited suggests that the covenant was practically thought of as binding the land itself.

[6] See 2 POLLOCK AND MAITLAND, HISTORY OF ENGLISH LAW, 2 ed., 343.

[7] See TERRY, PRINCIPLES OF ANGLO-AMERICAN LAW, § 147.

[8] See AMES, HISTORY OF ASSUMPSIT, 2 HARV. L. REV. 1, 16; Pinchon *v.* Legate, 9 Rep. 86; Sanders *v.* Esterby, Cro. Jac. 417.

[9] See WIGMORE, RESPONSIBILITY FOR TORTIOUS ACTS: ITS HISTORY, 7 HARV. L. REV. 315; POLLOCK, TORTS, 9 ed., 63 ff. It has even been suggested that the word *personalis* in the maxim was a misreading for *poenalis*.

[10] Sherrington's Case, Savile 40; see 3 STREET, FOUNDATION OF LEGAL LIABILITY, 70; see also opinion of Bowen, L. J., in Finlay *v.* Chirney, 20 Q. B. D. 494; POLLOCK, TORTS, 9 ed., 73, 74; SALMOND, TORTS, 2 ed., 66.

[11] See Hambly *v.* Trott, 1 Cowp. 370; Phillips *v.* Homfray, 24 Ch. D. 439.

[12] See Pitts *v.* Hale, 3 Mass. 321; Barnard *v.* Harrington, 3 Mass. 228; 3 STREET, FOUNDATION OF LEGAL LIABILITY, 222.

[13] The maxim *actio personalis moritur cum persona* would therefore seem to be a re-statement of the old notion that, in the case of obligations incurred during life, death of the obligor required positive law to revive them. See LANGDELL, A BRIEF SURVEY OF EQUITY JURISDICTION, 4 HARV. L. REV. 99.

[14] The technical nature of the distinction is shown by a modern case allowing a passenger to recover for injuries in a contract action, although the right to sue in tort had abated. Bradshaw *v.* Lancashire & Yorkshire R. Co., L. R. 10 C. P. 189.

character of the obligation is concerned, no substantial difference can be found between the right to compensation for the wrongful breach of a self-imposed contract duty, and the wrongful breach of a duty imposed by law not to commit a tort. The consequent unfairness of preferring a volunteer distributee over an injured party who may have been materially impoverished by the tort is obvious.[15]

The court distinguishes the principal case because the wrongdoer died before the plaintiff was injured. The reasoning seems to be that, where the deceased may project his personality after death sufficiently to commit a *post mortem* tort, justice requires a corresponding extension to make the estate liable. The argument is re-enforced by the fact that the estate of the deceased, as administered to-day, partakes of many of the features of an entity continuing the personality of the deceased. The result, however desirable, seems hard to support on common-law principles as historically developed. If no tort is committed till after death, there is then no tortfeasor to punish. Since the common law conceives of death as extinguishing pre-existing tort liability, *a fortiori* the impossibility of affixing a subsequently arising liability would seem to follow. And if the wrong occurred during the tortfeasor's life, the cause of action falls within none of the anomalous common-law exceptions which survive.[16]

ENJOINING CRIMINAL PROSECUTIONS AGAINST THIRD PARTIES. — It is clear that there are certain property interests for harm to which the law gives a remedy under some circumstances, while under other circumstances no remedy is given for reasons of policy in that it would unduly limit general freedom of action. These are surely interests recognized as rights by the law and under its protection. For equity to give a remedy for infringement of such legal rights would be, therefore, an exercise of concurrent jurisdiction as opposed to exclusive jurisdiction where equity protects interests not recognized by the law, as for example the interest of a *cestui*. It is submitted that equity has jurisdiction to give a remedy for infringement of such legal rights where the law gives no remedy, as well as where the law grants merely an inadequate one, and that it may exercise it if the reasons of policy preventing a legal remedy would not apply to an equitable one.

For example, suppose that a life tenant, without impeachment of waste, tears down buildings. The law gives no remedy to the remainderman for the injury to his interest, but equity will grant him an injunction.[1] Yet the remainderman's interest is legal, and he has a legal right to have it unimpaired. This is shown by the fact that he could sue an outsider for a trespass which injured it.[2] The truth must be,

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[15] See discussion, see SALMOND, TORTS, 2 ed., 65.

[16] That the gravamen of the wrong is injury to the feelings seems to be considered a special ground for the abatement of the cause of action. Thus recovery was denied in a suit for breach of promise although the action is closely akin to contract. Finlay *v.* Chirney, 20 Q. B. D. 494.

[1] Vane *v.* Barnard, 2 Vern. 738; Rolt *v.* Somerville, 2 Eq. Cas. Abr. 759, pl. 8; Aston *v.* Aston, 1 Ves. 264.

[2] Shortle *v.* Terre Haute, etc. R. Co., 131 Ind. 338, 30 N. E. 1084.